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No. 94-1851

In the Supreme Court of the United States

OCTOBER TERM, 1995

M & J COAL COMPANY AND MONONGAH DEVELOPMENT COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Monongah Development Company purchased rights to extract coal from the Monongah Mine and leased those rights to petitioner M & J Coal Company. Petitioners contend that federal regulators took their property by requiring M & J Coal to provide subjacent support to the surface estate overlying the mine in a manner that diminished the value of petitioners' mineral estates. The questions presented are:

1. Whether the property interests that petitioners acquired were limited by pre-existing restrictions on mine operators' rights to cause subsidence damage, restrictions that included a federal statutory prohibition against mining practices that endanger the public health and safety.

2. Whether, if petitioners were not limited by pre-existing restrictions, the restriction placed on petitioners' mining operations in order to abate a danger to public health and safety rose to the level of a Fifth Amendment taking.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Allegheny Mining Corp. v. *Callaghan*:	
No. 81-579 (Kanawha County Cir. Ct. Feb. 13, 1981)	4
No. 81-579 (Kanawha County Cir. Ct. Sept. 10, 1981)	4
Andrus v. *Allard*, 444 U.S. 51 (1979)	19
Ball v. *Island Creek Coal Co.*, 722 F. Supp. 1370 (W.D. Va. 1989)	15
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	11
Brown v. *Crozer Coal & Land Co.*, 107 S.E.2d 777 (W. Va. 1959)	15
California Housing Securities, Inc. v. *United States*, 959 F.2d 955 (Fed. Cir.), cert. denied, 113 S. Ct. 324 (1992)	13
Cogar v. *Sommerville*, 379 S.E.2d 764 (W. Va. 1989)	15
Concrete Pipe & Prods. of California, Inc. v. *Construction Laborers Pension Trust*,. 113 S. Ct. 2264 (1993)	12, 16, 18-19
Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986)	12, 16
Florida Rock Indus. v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987)	13
Golden Pacific Bancorp v. *United States*, 15 F.3d 1066 (Fed. Cir. 1994)	13
Johnson v. *Junior Pocahontas Coal Co.*, 234 S.E.2d 309 (W. Va. 1977)	14
Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987)	7, 18, 19, 20

Cases—Continued: Page

Lucas v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) 11, 12, 16
M & J Coal v. *OSM*, 115 I.B.L.A. 8 (1990) 7, 10
Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 16, 19
Rose v. *Oneida Coal Co.*, 375 S.E.2d 814 (W. Va. 1988) . 3
Ruckleshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 13
Scranton v. *Wheeler*, 179 U.S. 141 (1900) 12
Stamp v. *Windsor Power House Coal Co.*, 177 S.E.2d 146 (W. Va. 1970) 3, 14
Tabb Lakes, Ltd. v. *United States*, 10 F.3d 796 (Fed. Cir. 1993) 13
United States v. *Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) 12
West v. *National Mines Corp.*, 285 S.E.2d 670 (W. Va. 1981) 3
Wilson v. *Phoenix Powder Mfg. Co.*, 21 S.E. 1035 (W. Va. 1895) 3
Winnings v. *Wilpen Coal Co.*, 59 S.E.2d 655 (W. Va. 1950) 2, 14

Constitution, statutes and regulations:

U.S. Const. Amend. V (Takings Clause) 16
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 3
§ 503, 30 U.S.C. 1253 ..... 3-4, 5
§ 516(b)(1), 30 U.S.C. 1266(b)(1) 4
§ 521(a)(2), 30 U.S.C. 1271(a)(2) 6, 9, 10, 11, 13, 14, 17
Surface Coal Mining and Reclamation Act:
1980 W. Va. Acts ch. 87, W. Va. Code §§ 20-6-1 *et seq.* (1981) 3
§ 20-6-14(b)(1) (1981) 4, 5
§ 20-6-14(c)-(d) (1981) 5
§ 20-6-16(a) (1981) 14
1994 W. Va. Acts ch. 61, W. Va. Code §§ 22-3-1 *et seq.* (1994) 3
§ 22-3-14(b)(1) (1994) 4, 5, 14
§ 22-3-14(c)-(d) (1994) 5, 14

Statutes and regulations—Continued: Page

§ 22-3-25(a)(1) (1994) 14
30 C.F.R.:
Pts. 730-732 4
Pt. 843:
Section 843.11(a)(1) 6
Pt. 948:
Section 948.10 5
W. Va. Code of State Regs. (1991):
§ 38-3-12 5
§ 38-3-12(a)(7)(A) 19
§ 38-3-12(a)(7)(D) 19
§ 38-3-16.2(d) 5
§ 38-6-16.2(c)(1)-(2) 5
W. Va. Surface Mining Reclamation Regs.:
§ 7C.01 (1981) 5
§ 7C.02 (1985) 5
§ 7C.02(a)-(b) (1981) 5
§ 7C.03 (1981) 5
Miscellaneous:
46 Fed. Reg. 5915 (1981) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-16a) is reported at 47 F.3d 1148. The opinion of the Court of Federal Claims (Pet. App. 17a-38a) is reported at 30 Fed. Cl. 360.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1995. The petition for a writ of certiorari was filed on May 11, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

In July 1981, petitioner Monongah Development Company acquired rights to extract coal from the Monongah Mine in Marion County, West Virginia, and in 1985 it leased those rights to petitioner M & J Coal Company. Pet. App. 6a. In April 1986, the Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior found that M & J Coal's operations were causing surface subsidence that posed an imminent threat to public health and safety. *Id.* at 7a-8a. Pursuant to statutory authority, OSM ordered M & J Coal to cease mining until it abated that threat. Petitioners sued the United States in the Court of Federal Claims, contending that OSM's action had effected a taking of their property for which they were entitled to compensation. *Id.* at 8a-10a. The court granted the government's motion for summary judgment, and the court of appeals affirmed. *Id.* at 16a.

1. The legal ability of mineral interest owners in West Virginia to subside overlying surface estates is shaped by state common law and by state and federal statutes and regulations.

a. Under West Virginia common law, when surface and mineral estates are separated, the right of subjacent support may be retained for the benefit of the surface estate or disclaimed to increase the value of the mineral estate. See, *e.g.*, *Winnings* v. *Wilpen Coal Co.*, 59 S.E.2d 655, 658 (W. Va. 1950). Deed language is construed strictly to prevent inadvertent alienation of the right of subjacent support from the surface estate. *Ibid.* A surface owner's waiver of the right of subjacent support, once established, gives the mineral estate owner partial protection from common law tort

actions. A surface estate owner who has waived the right of subjacent support (or the successor to such an owner) may not enjoin or recover damages under a private nuisance or negligence theory for subsidence within the scope of the waiver. See, *e.g.*, *Rose* v. *Oneida Coal Co.*, 375 S.E.2d 814, 816 (W. Va. 1988); *Stamp* v. *Windsor Power House Coal Co.*, 177 S.E.2d 146, 148-150 (W. Va. 1970). An enforceable waiver by one surface estate owner, however, does not affect the common law rights of adjoining property owners, or of the public generally, to be free of hazards caused by underground mining operations.[1]

b. Enacted in 1980, the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA)[2] established a comprehensive regulatory program that "changed many of the old common law rules concerning the rights and remedies of surface owners *vis a vis* mineral owners." *Rose*, 375 S.E.2d at 816. That legislation was prompted by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, which established minimum national standards to control the environmental effects of surface mining (as well as the surface effects of underground mining) and a mechanism for States with qualifying programs to obtain primary regulatory jurisdiction over mining within their borders. See SMCRA

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[1] Compare, *e.g.*, *Wilson* v. *Phoenix Powder Mfg. Co.*, 21 S.E. 1035, 1036-1037 (W. Va. 1895) (explosives factory in populated area "is a public nuisance, and indictable as such"); see also *West* v. *National Mines Corp.*, 285 S.E.2d 670, 674-677 (W. Va. 1981) (coal haulers' right to use public road limited by homeowners' rights to be free from dust).

[2] 1980 W. Va. Acts ch. 87, initially codified at W. Va. Code §§ 20-6-1 *et seq.* (1981), currently codified, as amended, at W. Va. Code §§ 22-3-1 *et seq.* (1994).

§ 503, 30 U.S.C. 1253 (procedures for establishing state programs); see also 30 C.F.R. Pts. 730-732 (federal regulations governing state programs).

In accordance with SMCRA, WVSCMRA addressed the surface effects of underground mining as well as the effects of surface or strip mining operations.[3] West Virginia's program, including both WVSCMRA and the State's proposed regulations, was conditionally approved by OSM in January 1981. See 46 Fed. Reg. 5915 (1981). Interim provisions of the State's two-stage program took effect immediately.[4] The State's "permanent program," also set out in the initial regulations, took effect in 1983, following the termination of a state-court injunction against its implementation.[5]

West Virginia's program has closely tracked the SMCRA and the implementing federal regulations. In accordance with federal standards, West Virginia has required underground mining operators to take steps

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[3] Compare 1980 W. Va. Acts ch. 87, § 20-6-14(b)(1) (1981) (current version codified at W. Va. Code § 22-3-14(b)(1) (1994)) with SMCRA § 516(b)(1), 30 U.S.C. 1266(b)(1) (underground mining permits must include "measures * * * to prevent subsidence causing material damage").

[4] See W. Va. Surface Mining Reclamation Regulations (W. Va. SMRR) (1981). Subsequent, revised versions of those regulations were promulgated as W. Va. SMRR (1985) and W. Va. Code of State Regulations (W. Va. CSR) (1991). Relevant provisions of those regulations are reprinted at Gov't C.A. Br. A1-A34.

[5] See *Allegheny Mining Corp.* v. *Callaghan*, No. 81-579 (Kanawha County Cir. Ct. Feb. 13, 1981) (enjoining implementation of parts of West Virginia's state program); Order, *Allegheny Mining Corp.* v. *Callaghan*, No. 81-579 (Kanawha County Cir. Ct. Sept. 10, 1981) (extending injunction).

to prevent subsidence damage and to remedy some of the subsidence damage that nevertheless occurs. The subsidence-prevention component of the State's program has included a requirement that underground mine operators give surface owners and occupants six months' notice before mining beneath them and a prohibition on most mining beneath or in close proximity to public buildings, roads, and bodies of water.[6] The remedial component has included requirements that mine operators restore subsided land and, at times, that they repair or pay compensation for subsidence damage to structures.[7] During the period relevant here, primary responsibility for administration of those requirements was entrusted to the West Virginia Department of Energy (WVDOE).

c. When OSM approved West Virginia's program under SMCRA Section 503, the State assumed primary "regulatory authority in West Virginia for all surface coal mining and reclamation operations * * * on non-Federal and non-Indian lands." 30 C.F.R. 948.10. However, the Secretary of the Interior, acting through OSM, remained obligated to issue a federal cessation order whenever federal inspection of a West Virginia mine revealed a "condition [or] practice [that] * * * creates an imminent danger to the health or

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[6] See 1980 W. Va. Acts ch. 87, § 20-6-14(b)(1) and (c)-(d) (1981) (current version codified at W. Va. Code § 22-3-14(b)(1) and (c)-(d) (1994)); W. Va. SMRR 7C.01, 7C.03 (1981) (current versions codified at W. Va. CSR 38-3-12, 38-3-16.2(d) (1991)).

[7] See W. Va. SMRR 7C.02(a)-(b) (1981) (current version codified at W. Va. CSR 38-6-16.2(c)(1)-(2) (1991)). In late April 1986, when OSM undertook the enforcement action that gave rise to this litigation, state regulations did not require underground mine operators to remedy subsidence damage to structures. See W. Va. SMRR 7C.02 (1985).

safety of the public." SMCRA § 521(a)(2), 30 U.S.C. 1271(a)(2). A Section 521(a)(2) order requires immediate "cessation of surface coal mining and reclamation operations" and imposes "affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm." *Ibid.*; see 30 C.F.R. 843.11(a)(1).

2. In July 1981, petitioner Monongah Development purchased rights to the coal remaining in the Monongah Mine. After leasing those rights to Pittsburgh Coal Works for a three-year period, Monongah leased "the remaining unmined merchantable coal," together with related "mining rights and privileges," to petitioner M & J Coal in November 1985. C.A. App. 380-393. In March and April 1986, WVDOE, responding to complaints of subsidence damage from Marion County residents Carl Dingus and Joseph Tarley, inspected M & J Coal's operations and reviewed its permit status. Pet. App. 7a-8a, 21a-22a. WVDOE issued a series of notices of violation (NOVs) that required M & J Coal to fill surface cracks, to cease operations until it secured a state permit, to notify surface owners of their intentions to mine under their property, and to submit a revised subsidence control plan. See *id.* at 7a-8a, 21a-22a; C.A. App. 399, 401, 403, 406, 412.[8]

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[8] WVDOE later withdrew its NOV concerning inadequate notice to surface owners (C.A. App. 406), accepting M & J Coal's contention that it had "not actually mined under the Tarley residence, only adjacent to it," and that the Tarleys, therefore, had not been entitled to notice. See *id.* at 407. However, the IBLA, in determining an appropriate penalty for M & J Coal's violations, rejected M & J Coal's notice argument, ruling that the Company had been required to provide notice to

M & J Coal submitted its initial subsidence control plan to WVDOE on April 14, 1986. That plan indicated that no effort would be made to prevent the subsidence of occupied dwellings. M & J Coal claimed to have acquired "legal rights" to cause subsidence damage to "approximately sixteen" privately owned structures "without liability."[9] The company promised to prevent subsidence of six surface features protected by state regulations—"two perennial streams, three public roads, and one high tension power pole." See AR T.309 (CR 4), Doc. 2 (Plan at 5-6). M & J Coal's plan indicated that the company would retain pillars and blocks of coal under those surface features in portions of the seam defined by a fifteen-foot setback and a fifteen-degree angle of draw. See Pet. App. 7a, 21a.[10]

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all surface residents within the angle of draw. *M & J Coal* v. *OSM*, 115 I.B.L.A. 8, 26 n.14 (1990).

[9] See Administrative Record Tab (AR T.) 309 (CR 4), Doc. 2 (Plan at 4-8). (The Administrative Record was filed with the trial court in May 1993.) The record does not disclose where those structures were or on which deeds M & J Coal relied as enforceable waivers of the right of subjacent support.

[10] Under those standards, limits on M & J Coal's full-extraction operations were to be established by (1) moving outward from the perimeter of each protected surface feature for a distance of fifteen feet; (2) dropping vertical lines from the extended perimeter downward through the coal seam; and (3) projecting a fifteen-degree angle, measured at the surface from the vertical, out into the coal seam. An explanatory diagram was included in M & J Coal's subsidence control plan. See AR T.309 (CR 4), Doc. 1 (at 8); see also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 477 n.7 (1987) (describing Pennsylvania's use of a fifteen-degree angle of draw as a benchmark for subsidence protection). The court of appeals was incorrect in its statement (see Pet. App. 7a n.2) that the angle of draw was to have been measured from the "roof of the mine,"

On April 25, 1986, WVDOE approved M & J Coal's initial plan and authorized the company to resume mining. Pet. App. 7a, 22a. On that same date, Joseph Tarley contacted OSM with information concerning additional, more severe subsidence damage to his property. *Id.* at 22a-23a; C.A. App. 29. Tarley stated that he and his wife were moving out of their house to escape subsidence-related hazards. As he recounted in a later affidavit:

> The needle on the gas meter had been spinning wildly. The section of the gas line immediately adjacent to the gas meter was severed. My water line to the public water supply also broke, and the access wires that the electric company had installed outside our house were leaning and stretching as tight as a fiddle string.

Pet. App. 22a-23a.

Upon receiving Tarley's call, OSM inspectors returned to the Tarley property. The inspectors became concerned that "people would fall into the subsidence cracks or a distressed structure would collapse on an individual" and that additional subsidence could affect "up to 16 homes" in the vicinity, "along with public roads, utilities, and a stream." C.A. App. 28. The inspectors contacted WVDOE and requested that the State use its authority under WVSCMRA to abate the hazard. State regulators declined to act on the ground that they considered M & J Coal to be in compliance with state law. Pet. App. 24a. OSM officials concluded, however, that M & J Coal's operations posed an imminent danger to the health and safety of the public.

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rather than from the surface of the earth, although the error did not affect its legal analysis.

OSM therefore issued a cessation order, dated April 25, 1986, directing M & J Coal to halt its operations until it had safeguarded the public from surface cracks, restored the land's capacity to support prior uses, and revised its subsidence control plan "to ensure that the health and safety of the general public [would] not be endangered." C.A. App. 35; see Pet. App. 8a-9a, 24a-25a. Five days later, M & J Coal proposed to revise its subsidence control plan to increase (to thirty degrees) the angle of draw used to limit mining under protected surface features and to treat occupied houses as protected features. *Id.* at 9a, 25a. Based on M & J Coal's agreement to make those revisions, OSM lifted its cessation order. *Ibid.*

3. M & J Coal sought administrative review of OSM's cessation order and its related recommendation that M & J Coal be required to pay a $2,700 fine. An Administrative Law Judge (ALJ) in the Department of the Interior's Office of Hearings and Appeals upheld OSM's actions as a valid exercise of its authority under SMCRA Section 521(a)(2). C.A. App. 74-87. In the ALJ's view, events at the Tarley and Dingus residences fully supported OSM's finding that M & J Coal had caused "imminent danger to the health or safety of the public." OSM, the ALJ found, "would have been grossly remiss in its enforcement role had it not ordered a cessation of M & J's underground coal mining operations." *Id.* at 82; see *id.* at 86 (assessing civil penalty of $3,500).

The ALJ's ruling was affirmed by the Interior Board of Land Appeals (IBLA). The IBLA found that the effects of the subsidence, including ruptured gas and water lines, shifted electric utility poles, and a crack in the ground so large that a dog fell in and died before rescuers could reach it, "present[ed] a graphic picture

of an imminent danger situation." *M & J Coal* v. *OSM*, 115 I.B.L.A. 8, 23 (1990); see C.A. App. 264-265. Accordingly, the IBLA concluded that OSM's cessation order had been fully authorized by Section 521(a)(2) of the SMCRA. M & J Coal did not seek judicial review of the IBLA's decision. See Pet. App. 9a, 15a.

4. In April 1992, petitioners filed suit in the Court of Federal Claims (CFC), alleging that OSM's actions had effected a taking of two categories of coal deposits: (1) portions of the seam that were placed off-limits by the change from a fifteen-degree to a thirty-degree angle of draw to delineate the area of support under protected surface features; and (2) portions of the seam that were placed off-limits by the extension of subsidence protection to occupied dwellings. The CFC granted the United States' motion for summary judgment. Pet. App. 17a-38a. The court pointed out that petitioners had acquired their interests in the Monongah Mine after Congress directed OSM, in Section 521(a)(2) of the SMCRA, to halt mining practices that endanger the public health and safety. That provision, the CFC found, precluded petitioners from forming a compensable expectation that they would be able to mine under a fifteen-degree subsidence control plan or to cause subsidence damage to occupied houses. Pet. App. 33a, 36a. The court noted that the validity of OSM's cessation order as an exercise of its mandate under Section 521(a)(2) had been definitively established by the final, unchallenged decision of the IBLA. Pet. App. 33a & n.3.

5. The court of appeals affirmed. Pet. App. 3a-16a. The court concurred in the CFC's determination that petitioners had never acquired the property rights that OSM's cessation order was alleged to have infringed. *Id.* at 13a. The court ruled that M & J Coal

"knew or should have known" in November 1985, when it leased its mining rights from Monongah Development, "that it could not mine in such a way as to endanger public health or safety." *Id.* at 14a.[11] In the view of the court of appeals, the IBLA's ruling that OSM had acted properly to avert an imminent threat to public health and safety was "incontestable" in light of M & J Coal's failure to seek judicial review, *ibid.*, and foreclosed the argument that OSM had impermissibly transferred property from petitioners to the Dingus and Tarley families, *id.* at 15a-16a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court. Further review is therefore unwarranted.

1. "[T]he range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments" is defined by "existing rules or understandings that stem from an independent source such as state law," and "the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings.'" *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). By July 1981, when Monongah Development acquired its interest in the Monongah Mine, the surface effects of underground mining were strictly regulated under

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[11] The court did not discuss the rights that Monongah Development acquired in July 1981, see page 6, *supra*, though the same limitations clearly existed at that time, since Section 521(a)(2) of the SMCRA dates from 1977.

both federal and state law. Because those restrictions on petitioners' mining activities "inhere[d] in the title itself," *Lucas*, 112 S. Ct. at 2900, application of the federal regulatory scheme could effect no compensable taking.

Petitioners contend (Pet. 19-22) that under West Virginia law their proposed mining activities would have constituted at most a private nuisance; that the Dingus and Tarley families would have been entitled to no state-law remedy because their predecessors in interest had relinquished by contract all rights of subjacent support for the relevant surface estates; and that the restrictions imposed by OSM went beyond those imposed by background principles of state property law. That argument is flawed in two respects.

First, federal law is itself a source of "relevant background principles," *Lucas*, 112 S. Ct. at 2901, that may serve to define the scope of constitutionally protected property interests. In *Lucas*, this Court identified the federal navigational servitude at issue in *Scranton* v. *Wheeler*, 179 U.S. 141, 163 (1900), as an example of a "pre-existing limitation upon the landowner's title" that may foreclose a claim for compensation. 112 S. Ct. at 2900; accord *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 703-704 (1987). This Court has frequently looked to rules and understandings supplied by federal law to assess the expectations that takings claimants could reasonably have entertained at the time of their investments.[12] Since petitioners

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[12] See, *e.g.*, *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2291 (1993) (pension plan liabilities); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986) (same);

acquired their mineral interests well after passage of the SMCRA, they can assert no rights inconsistent with the Act's requirements.[13]

It is far from clear, moreover, that the OSM cessation order actually imposed restrictions going beyond those applicable under state law. Since 1980,

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Ruckleshaus v. *Monsanto Co.*, 467 U.S. 986, 1006-1007 (1984) (pesticide safety data supplied to the government); see also *Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1074-1075 (Fed. Cir. 1994) (shareholder in bank that federal regulators took over lacked "historically rooted expectation of compensation" required to support taking claim); *California Housing Securities, Inc.* v. *United States*, 959 F.2d 955, 958-959 (Fed. Cir.) ("history of governmental regulation of savings and loan associations" precluded owner from asserting "historically rooted expectation of compensation" for federal takeover), cert. denied, 113 S. Ct. 324 (1992).

[13] Petitioners also assert (Pet. 18) that OSM misused its authority under Section 521(a)(2) of the SMCRA to confer "economic benefits on the Dingus and Tarley families alone, at the expense of petitioners," and that OSM's actions therefore "cannot be said [to have] substantially advanced a legitimate public interest." That characterization of OSM's actions is foreclosed, as both lower courts noted (see Pet. App. 15a-16a, 33a & n.3), by the IBLA's determination, which petitioners declined to challenge in district court, that OSM acted properly to abate an imminent threat to the public health and safety. Under established principles of Tucker Act jurisdiction, the IBLA's determination was not subject to collateral attack in petitioners' suit for compensation. See *id.* at 15a, 33a (citing *Florida Rock Indus.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987)); accord, *e.g.*, *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 802-803 (Fed. Cir. 1993). Petitioners' characterization of OSM's actions is also contradicted by the record, which makes clear that the subsidence caused by petitioners' mining activities created hazards (*e.g.*, the increased risk of a gas explosion, an electrical fire, or a gap in a public road) to the public generally.

West Virginia has had its own statutory prohibition on mining practices that create an "imminent danger to the health or safety of the public," 1980 W. Va. Acts ch. 87, § 20-6-16(a) (1981) (current version codified at W. Va. Code § 22-3-14(b)(1) and (c)-(d) (1994))—a prohibition virtually identical to SMCRA Section 521(a)(2).[14] The IBLA's determination that M & J Coal's operations threatened the public health and safety also has implications under West Virginia's common law of nuisance. Under West Virginia law, a valid waiver of the right of subjacent support shields a mineral estate owner from most tort claims by the owner of the unsupported surface estate.[15] But the

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[14] Petitioners point out (Pet. 7, 15) that WVDOE officials were prepared, on April 25, 1986, to allow M & J Coal to operate under its initial subsidence control plan, notwithstanding reports from the Tarley and Dingus homes. But state officials' spur-of-the-moment assessment that M & J Coal's initial subsidence control plan satisfied West Virginia law, an assessment reached in response to federal officials' request for immediate state action, was neither final nor conclusive. Indeed, WVSCMRA includes a citizen-suit provision, see W. Va. Code § 22-3-25(a)(1) (1994), to ensure that state courts are able to correct state regulators who have taken an unduly limited view of their responsibilities under WVSCMRA. The decision of WVDOE officials not to issue a state cessation order neither reflected nor created a state-law right for M & J Coal to mine under its initial subsidence control plan.

[15] See, *e.g.*, *Winnings* v. *Wilpen Coal Co.*, 59 S.E.2d at 658-661. But see *Stamp* v. *Windsor Power House Coal Co.*, 177 S.E.2d at 150 (waivers may only bar "recovery for *negligence*," not for "wilful or wanton" acts); *Johnson* v. *Junior Pocahontas Coal Co.*, 234 S.E.2d 309, 313, 314 (W. Va. 1977) (coal company's reservation of right to produce coal "without liability for damage and injury to and destruction of the surface" cannot "be raised as a complete shield from all liabilities which may be indicated by evidence showing defendant's violations of rules,

subsidence that prompted OSM to act in this case threatened harm to parties outside the chains of title to the severed mineral and surface estates. Dangers associated with ruptured gas, electrical, and water lines are not confined to the boundaries of the surface estate where the subsidence occurs. Since deed-based immunity from liability for subsidence harms reaches only to the boundary of the unsupported surface estate, see note 1, *supra*, any deed-based rights that petitioners acquired to subside occupied dwellings were limited by the protections that West Virginia nuisance doctrine provides to neighboring property owners and to the public at large.[16]

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regulations and laws, its wilful, wanton and reckless actions and conduct, or its creation of hazardous or nuisance conditions incident to its strip mining operations").

[16] West Virginia law concerning the construction of severance deeds may also limit petitioners' rights to subside occupied dwellings. West Virginia's Supreme Court of Appeals has emphasized that broad form waiver provisions must be "construed in light of the conditions and reasonable expectations of the parties." *Cogar* v. *Sommerville*, 379 S.E.2d 764, 769 (W. Va. 1989). Thus, "mining methods not contemplated at the time of the severance deed may not be utilized." *Ibid.*; see *Brown* v. *Crozer Coal & Land Co.*, 107 S.E.2d 777, 786-787 (W. Va. 1959) (auger mining was not contemplated by sellers of mineral estates and, therefore, not covered by waiver). But cf. *Ball* v. *Island Creek Coal Co.*, 722 F. Supp. 1370, 1372-1374 (W.D. Va. 1989) (because longwall mining is different from early forms of subsurface mining in degree, not in kind, subsidence damage from longwall mining falls within scope of broad form waiver). Petitioners have repeatedly acknowledged that M & J Coal was able to extract profitable quantities of coal from the twice-worked Monongah Mine only by exploiting "advances * * * in mining equipment and technology" that allowed significantly higher rates of extraction. Pet. 4; see Pet. App. 19a.

In sum, legal principles in existence when petitioners acquired their mineral interests sharply limited their right to subside the surface overlying the Monongah Mine. OSM's April 25, 1986, cessation order merely enforced those pre-existing limitations. Because a right to endanger public health and safety "w[as] not part of [petitioners'] title to begin with," *Lucas*, 112 S. Ct. at 2899, the cessation order could not effect a taking of petitioners' property.

2. Even if OSM's enforcement action had imposed new limitations on petitioners' mineral estates, those limitations would not rise to the level of a Fifth Amendment taking. In *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2291 (1993), this Court reaffirmed the framework first articulated in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 125 (1978), for evaluating regulatory takings claims. That approach focuses on "three factors with particular significance" for assessing whether a land use restriction effects a Fifth Amendment taking: (1) the character of the governmental action; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant. See *Concrete Pipe*, 113 S. Ct. at 2291 (quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986)). Under that framework, the limitations on mining at issue here would not effect a taking even if they had been imposed after petitioners acquired their mineral interests.

Essentially for the reasons discussed above, the first two factors strongly indicate that no taking occurred here. OSM issued its cessation order in furtherance of its statutory mandate to abate "an

imminent danger to the public health and safety." SMCRA § 521(a)(2), 30 U.S.C. 1271(a)(2). Two administrative tribunals rejected M & J Coal's arguments that OSM had exceeded the scope of that mandate, and petitioners declined to seek direct judicial review. Moreover, the requirements of the SMCRA (at least as applied in this case) differ little, if at all, from applicable state-law norms. Accordingly, petitioners can establish no substantial interference with investment-backed expectations.

Nor have petitioners shown that OSM's cessation order imposed an onerous economic burden. Petitioners have not disputed the CFC's finding that M & J Coal realized profits of $692,086.41 from the Monongah Mine during the period from 1985 through 1989—a 34.5% annual rate of return on its initial investment. Pet. App. 28a; see *id.* at 10a n.5 (court of appeals' recitation of CFC figure); see also Pet. C.A. Reply Br. 4 (concession that "the Companies realized a profit on their efforts even after the taking"). Although the record does not disclose Monongah Development's profits, Monongah also appears to have done quite well. After purchasing the rights to rework the Monongah Mine for $400,000 in July 1981, Monongah Development leased those rights to Pittsburgh Coal Works (PCW) on undisclosed terms for three years before leasing the mine to M & J Coal in 1985. See C.A. App. 380, 383, 386. Based on M & J Coal's sales figures for the period from 1986 through 1989 (the only years for which M & J Coal's sales figures were made available), it appears that Monongah Development's royalties for that period alone repaid

more than half of its initial investment.[17] The economic effects of the alleged infringement on petitioners' property interests, in short, provide no support for their takings claims. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495-496 (1987) (rejecting claim that anti-subsidence statute took coal operators' property, where plaintiffs failed to demonstrate that any mine had been rendered unprofitable).

Petitioners seek to avoid this analysis by claiming to have suffered a total loss of the value of a smaller parcel of property. See Pet. 17-19. The relevant property, they contend, is not the mineral estate that Monongah Development acquired in 1981, or even the diminished mineral estate that Monongah Development leased to M & J Coal in late 1985. Rather, petitioners claim a total taking of "defined blocks of coal," totalling 99,700 tons, that M & J Coal's revised subsidence plan allegedly required it to leave in place. Alternatively, they claim a total loss of the support estate underlying protected surface features. Pet. 12, 18-19.

Essentially the same arguments were squarely rejected by this Court in *Keystone*. Although the parties in that case had stipulated that a Pennsylvania anti-subsidence rule would require the plaintiffs "to leave approximately 27 million tons of coal in place," the Court found that this coal did "not constitute a separate segment of property for takings law purposes." 480 U.S. at 498; accord *Concrete Pipe*, 113 S.

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[17] See C.A. App. 107-110 (listing coal sales from the Monongah Mine totaling $5,666,667 for the period from 1986 to 1989); *id.* at 386 (M & J Coal's agreement to pay royalties set at 4% of gross sales).

Ct. at 2290 (property cannot be "divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable").[18] The Court also refused to segment the mine operators' mineral interests by treating the "support estate" as a separate form of property that had been rendered valueless. The Court acknowledged that Pennsylvania property law, which was "apparently unique" in this respect, treated "the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate." 480 U.S. at 500. The Court found, however, that its earlier takings decisions "foreclose[d] reliance on such legalistic distinctions within a bundle of property rights." *Ibid.* (citing *Penn Central*, 438 U.S. at 130 (air rights), and *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (right to sell property)); see *Keystone*, 480 U.S. at 501 (noting that the only practical value of the support estate is as a complement to either the surface or the mineral

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[18] The *Keystone* dissent, citing the parties' stipulation that 27 million tons of coal had been locked in place by the statute and regulations at issue there, would have treated the retained coal as a distinct segment of property under the circumstances of that case. 480 U.S. at 514, 517-518 (Rehnquist, C.J., dissenting). Here, however, there is no such stipulation. In fact, it is possible that petitioners could have substituted other forms of support for retained coal deposits. See W. Va. CSR 38-3-12(a)(7)(A) and (D) (1991) (authorization for operators to use "backstowing" or "backfilling" as alternatives to coal retention). Petitioners offered no evidence that such alternatives were technically or economically infeasible in the Monongah Mine.

estate).[19] The Court thus squarely rejected the arguments advanced by petitioners here. Petitioners' takings claim would therefore fail even if OSM's enforcement action had infringed on rights inherent in their title.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[19] The *Keystone* dissent took the position that Pennsylvania's atypical treatment of the right of subjacent support provided alternative grounds for segmentation. See 480 U.S. at 520 & n.8. That argument for segmentation of the support estate has no application to the instant case. Although petitioners insist (Pet. 23) that their right of subjacent support represents a "distinct property interest," the only authorities cited in support of that proposition are two state trial court opinions (see Pet. App. 39a-48a), neither of which suggests that West Virginia treats this right as a "third estate" that can be conveyed independently of surface and mineral rights.